UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CHARLES STROUCHLER, et al.,

Plaintiffs,

v. 12 Cv. 3216 (SAS)

NIRAV SHAH, M.D., et al.,

Defendant.
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July 17, 2012
10:10 a.m.

Before:

HON. SHIRA A. SCHEINDLIN
District Judge

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(In open court)

THE COURT: Ms. Salzman, Ms. Dougherty.

And you are Mr. Taylor?

MR. TAYLOR: Yes.

THE COURT: Mr. Kraft.

MR. KRAFT: Yes, Judge.

This is Jane McCloskey with the Department of Health.

THE COURT: Ms. McCloskey.

Mr. Rosinus.

MR. ROSINUS: Yes.

THE COURT: Mr. Kitzinger.

MR. KITZINGER: Good morning, your Honor.

THE COURT: And you are?

MS. YI: Gloria Yi.

THE COURT: Ms. Yi. All right.

We are going to hear from Ms. Willard today?

MS. SALZMAN: Yes.

THE COURT: OK. Who is calling Ms. Willard?

MR. KRAFT: I am calling her as a Department of Health witness. I would like to call Margaret Willard to the stand.

MARGARET WILLARD,

called as a witness by the defendants,

having been duly sworn, testified as follows:

THE COURT: State your full name, first and last, spelling both for the record.

THE WITNESS: Margaret, M-A-R-G-A-R-E-T, Willard, W-I-L-L-A-R-D.

THE COURT: All right, Mr. Kraft.

MR. KRAFT: First, let me begin by thanking both the Court and plaintiffs' counsel for agreeing to take this testimony out of turn. Ms. Willard would not be available when we have the remainder of this hearing, and we appreciate everyone's indulgence.

THE COURT: OK.

DIRECT EXAMINATION

BY MR. KRAFT:

Q. Ms. Willard, are you employed?

A. Yes, sir. I am employed by the New York State Department of Health.

Q. What do you do there?

A. At the moment, I am the bureau director for state plan Medicaid services.

Q. Are you familiar with the category of Medicaid funded services known as personal care services?

A. Yes, I am.

Q. How long have you been working in the personal care services field?

A. I have been involved in the personal care services program and field for 32 years.

Q. Was that all with the New York State Department of Health?

A. No. The first 11 years was with a social service district Rensselaer County, and then the remaining time is with the Department of Health.

Q. Can you tell us briefly what personal care services are?

A. Personal care services are home and community based services. They provide supportive services to individuals to remain in the community. There is assistance with activities of daily living as well as what are referred to as housekeeping type of tasks.

Q. So Medicaid recipients who are eligible to get personal care services, they receive them in their homes?

A. Yes.

Q. Does the Department of Health regulate this category of service?

A. Yes, they do. It is a state plan service for which we have some federal oversight as well as state oversight. The program is administered by the local social service districts.

Q. So when you say administered by the local social service districts, what do you mean by that?

A. The local social service districts are really the site, the center for which the assessments for the services come from. They coordinate both the social and nursing assessments for individuals who are Medicaid recipients and have a medical need for the services.

Q. So just to see if I understand it correctly, it means that the Department of Health, which you work for, doesn't make the initial decision that any particular Medicaid recipient is eligible for a given level of personal care services?

A. No. That's correct.

Q. What is the range of personal care services a Medicaid recipient can get?

A. A Medicaid recipient can get a wide range of service, from an hour a day, to 24 hours per day, seven days a week, four days a week, whatever the need is present.

Q. Now, this case was brought by a group of plaintiffs who happen to be receiving 24 hours a day services, what they call split-shift services. What other possibilities are available for those plaintiffs? What else could they get?

A. Individuals could receive three eight-hour-a-day services, they could receive two 12-hour-a-day services, they could receive live-in services, or they could receive six hours a day of services. It runs the gamut depending on the assessed needs of the individuals.

Q. How does the local social services district -- in this case, it's about New York City people. So who is the local social services district in New York City?

A. In New York City, the personal care service program is administered by HRA, Human Resource Administration.

Q. So what is the process through which HRA decides what level of services in particular a recipient should get?

A. The first step is that an individual who expresses a need or an interest in personal care services reaches out to the physician and the physician documents that there is a medical need for service. That documentation is in New York City on an M11q physician's order form, which speaks to the diagnosis, the medications, and the functional limitations of that individual.

At that point, HRA then conducts an assessment, both a nursing and social assessment, and that assessment determines the functional limitations of the individual within their home setting, and then the number of hours required to be able to safely meet their needs and maintain them in the community.

Q. Are there any different rules for the assessment process for the highest level of service, 24-hour service?

A. 24-hour service is continuous care service. Individuals have to have a total help need in one of their activities of daily living: Transferring, toileting, walking, and feeding.

Q. Does HRA have to get any special approval for this level of service?

A. If an individual has a need for continuous care services, they are required to have that assessment reviewed by their local medical director.

Q. The local medical director, sometimes referred to as the LMD, is that an employee of HRA?

A. It could either be a direct employee of HRA or a contracted employee.

Q. But it's not the patient's own doctor, it's someone separate?
A. It is not. It is not the patient's personal physician.
Q. Because the personal physician was the one who started the process by suggesting that the patient needs personal care services?
A. Correct.
Q. So these LMDs, how are they supposed to decide if a particular recipient needs the 24-hour services?
A. The role of the local medical director is to review the assessment, to look at the physician's order as well as the assessment, to make sure that all of the assessments and orders are in agreement. If it is not an initial assessment, they should be looking at the previous assessment to see if there has been any change in condition.
Q. Do the LMDs have any standards that they are supposed to apply when looking at these assessments and making the decision that a particular recipient needs or does not need 24-hour service?
A. The LMD would look at the regulations to see what the qualifications are, the criteria, and assure that that criteria was met.
Q. Now, you said earlier that you know about these regulations as part of what the Department of Health does?
A. Yes.

Q. Were these regulations changed recently?
A. Yes. These regulations were changed recently, within the last year they were changed.
Q. Were you involved in that process?
A. Yes, I was involved.
Q. Why were they changed?
A. They were changed as a result of an authorization given to the commissioner to review the regulations and decide if any changes need to be made, and that's what precipitated that.
Q. This authorization came from where?
A. From the Legislature.
Q. We will have to try to obey them.
A. We try.
Q. As you understand it, what was the effect of the change that was made last fall?
A. The change that was made, in terms of the continuous care requirement, requiring review of the LMD, was changed from 24 hours to 16 hours. So in a case that had 16 or more hours had to be reviewed by the local medical director.
Q. Whereas before only the 24-hour cases were reviewed by the LMD?
A. Yes. That's correct.
Q. Did the standards that the LMDs were expected to apply change?
A. No, sir.

Q. Some words in the actual language of the regulations did change, didn't they?
A. Yes, they did.
Q. Did the department indicate in any way what the changed language was supposed to do to application of the regulations by the LMDs?
A. I believe that it was a small word change that was made to the regulations, and I think that the administrative directive was released after the regulations made it clear that the word change had no impact on the previous policies.
Q. Are you familiar with this complaint, this complaint in the Strouchler litigation?
A. Yes, sir.
Q. How would you characterize the allegation in the complaint?
A. I think there is an issue regarding continuous care services, in the sense that I think there's two issues, one with the tasks that are qualified for 24-hour care and another issue with the change in the wording from uninterrupted care to unscheduled care, unscheduled needs.
Q. Well, is it your understanding that what the complaint is alleging is that plaintiffs, like the named plaintiffs and others that they seek to represent, their level of personal care services is being cut more than it used to be; is that how you understand it?
A. Yes, it is.

Q. Now, without addressing whether or not that's actually happening because -- do you know whether that's happening? Does Health keep any sort of census to see how many people are on what level of personal care services in any month?
A. Not in any month, no, sir.
Q. So you wouldn't know whether or not more people are being cut than used to be?
A. I would have no record.
Q. Let's assume just for a minute that that is true. Is it your understanding that the regulations require that or should have led to that?
A. No. It's not my understanding at all. I thought the changes in the regulations would not lead to a change in the pattern.
Q. I would like to show you and have marked as an exhibit --
MR. KRAFT: I would like to have an exhibit marked.
THE COURT: My clerk can hand it to the witness. It will make it easier.
Q. So I had marked for identification a document as our exhibit. Do you recognize this document?
A. I do.
Q. What is it?
A. This is the affidavit prepared for this Court.
Q. And you signed that affidavit?
A. I did.

Q. Did you participate in having the contents inside?
A. Yes, I did.
Q. You're familiar with it?
A. I am.

MR. KRAFT: I would like to move that into evidence as our exhibit, whatever number we have, A or 1.

THE COURT: No objection?

Exhibit A is received.

(Defendants' Exhibit A received in evidence)

Q. That affidavit, am I correct in saying, covers the questions I have asked and a lot more issues that I haven't gone into here but in more detail?
A. Yes.
Q. I am hoping not to go into all of them here, but I am glad that that affidavit is there in case the subjects in there come up.

MR. KRAFT: I have no further questions at this time.

THE COURT: Thank you, Mr. Kraft.

Mr. Rosinus or Mr. Kitzinger, do either of you have questions?

MR. ROSINUS: We have some questions.

CROSS-EXAMINATION

BY MR. ROSINUS:

Q. Good morning, Ms. Willard.
A. Good morning.

Q. I would like to talk about turning and positioning and transferring.
A. Yes.
Q. Is it true that you turn and position a patient generally in bed to prevent bed sores?
A. Yes.
Q. Is it true that there is a standard of care for the frequency of turning and positioning?
A. It depends on the individual, yes.
Q. If you don't do it frequently enough, it will lead to bed sores?
A. That's correct.
Q. Certain individuals will need it more frequently than others?
A. Correct, depending on their diagnosis and their skin integrity, yes.
Q. Is a person likely to be in bed the whole time he is being turned and positioned?
A. Yes.
Q. That's because it's done overnight as well as during the day, is that right?
A. Yes.
Q. Transferring -- to quote from your affidavit, paragraph 62 -- is moving "from bed to standing, from standing to chair or wheelchair, and the reverse," is that right?

A. Yes.
Q. Is it fair to say that the purpose of transferring is moving a person from one place to another or from sitting to standing?
A. Yes. Transferring from one place to another, yes.
Q. That's the reason you do it?
A. Yes.
Q. Is it fair to say that you can't be said to be transferring if you remain in bed?
A. If you're totally bed bound?
Q. Right.
A. You would not be transferred. You would be repositioned. Yes.
Q. Understood.
If an aide turns and positions a patient from one spot on the bed to another spot on the bed, the patient remains in bed the entire time, would you call that transferring?
A. No. No.
Q. So there is a difference between transferring on the one hand and turning and positioning on the other, is that right?
A. There is a difference in turning and positioning versus transferring, but the skill sets are similar, yes.
Q. But they are different activities?
A. They are different activities, yes.
Q. They have different purposes, is that right?

A. Well, the overall purpose of both is to make sure the person is in the most optimal place that they should be in at that point in time. So they have that in common.

Q. Fair enough.

You said earlier that turning and positioning's purpose is to prevent bed sores and transferring's purpose is to move someone from one place to another, is that right?

A. That's correct.

MR. ROSINUS: Your Honor, I would like to have a document marked, and I don't know if we want to mark it Exhibit B or City Defendant's A, whatever the Court prefers.

THE COURT: I think B is fine. Do you have any stickers with you?

MR. ROSINUS: I don't, your Honor. I apologize.

THE COURT: Do you have, Mr. Kitzinger?

MR. KITZINGER: I don't.

May I have a moment?

THE COURT: Sure.

MR. ROSINUS: Actually, your Honor, I take that back. I am not going to submit an exhibit at this time.

THE COURT: OK.

MR. ROSINUS: May I have a moment, your Honor?

THE COURT: Yes.

Q. Ms. Willard, let's turn to paragraph 68 of your affidavit.

In that paragraph, you define some assistance to refer

to a function or task performed "for a patient with help from another individual," is that correct?
A. That's correct.
Q. Just to clarify, doesn't the regulation define some assistance as a function or task performed "by the patient with help from another individual" rather than for?
A. I don't have the regulation right in front of me.
Q. Total assistance you define as a function or task that's "performed or completed for the patient," is that right?
A. Correct.
Q. There is something that I was a little bit unclear on and maybe you can help me. In paragraph 74 of your affidavit, you say that a patient requires some assistance if he or she needs help with bathing, toileting or transferring that "can be provided by means other than human hands," is that right?
A. Yes.
Q. Can you explain what you mean by that?
A. Well, take the example of toileting. Someone could need some assistance with toileting. They could need someone to help them on and off the toilet. But if there were grab bars added around the toilet, they could be independent with a raised toilet seat and grab bars. So, I mean, that's other than human hands to help them with their toileting functions.
Q. In that instance, would an aide be helping them at all with the toilet?

A. It depends. Each individual has to be assessed based on their functional status. So it's very hard to make a black and white decision of whether an individual would or would not. So many things go into someone's functional abilities.

Q. Sure. When you say "by means other than human hands," doesn't that mean no help from an aide?

A. It could mean no help, yes, in that particular function. But toileting may also include something like, the function of toileting also would include washing someone's hands, and while someone could get up from the toilet, they couldn't turn on the sink because of some problems with their hands, and then the aide would have to be there to help them in that function. So the whole global toileting is more extensive.

Q. Sure. I guess what I am trying to understand is, you say that some assistance may mean assistance by means other than human hands. But earlier you defined some assistance to mean help from another individual?

A. I think it can be both ways. I don't think one precludes the other. I think in some instances, depending on what the task is, it can be done with some assistance from an individual. And then at other times, certain tasks can be done, but only with some physical help from another person. It really depends on diagnosis. It depends on your functional abilities. So it isn't always one way or the other.

Q. I understand. Let me give you an example. Let's say someone can use the toilet with a grab bar and can get on the toilet, do his or her business, use the grab bar to get up, and that's it, and doesn't require help from anyone. Is that some assistance?

A. I would say that could be some assistance, yes. It's not necessarily assistance by an individual in that case. It's by something other than human hands in that case.

Q. How does that fit with the definition of some assistance defined as help from another individual?

A. I am just going to go back and refresh my memory.

Q. Sure. Take your time.

A. I think the confusion comes in in that the regulations speak to some help, some assistance, meaning assistance with a task by a person. But when you are actually completing an assessment, if you are using certain tools, and as you're doing your assessment, if someone needs something other than human hands in order to complete that function, then we do say that the individual still requires some assistance. And I think that's sometimes very confusing, and I can't explain it any other way to make it clearer.

Q. Thank you.

To stick with the person who can toilet himself with a grab bar and doesn't need other assistance, and let's assume that that person doesn't need assistance with any other task. Would that person qualify for PCS services?

A. When districts call and seek direction, I really have a hard time in giving them a black and white answer in a situation like that, because I haven't seen the individual. I haven't seen the other abilities of the individual. So it's very hard for me to come out and tell them a definite answer, does this person qualify or doesn't this person qualify. And I wouldn't tell a district, so I am not sure where to go with your question.

Q. I understand you're thinking practically. Let's consider a hypothetical. I am giving you these facts.

A. OK.

Q. You have a patient who has been assessed comprehensively. The assessment has determined that this person needs no assistance, except for toileting the person needs a grab bar and not an attendant. Would that person qualify for PCS?

A. Part of the assessment for personal care is that you need to look for efficiencies. If that individual, that is the only functional deficit that they have in isolation, that's the only thing they could not do, but the addition of grab bars into a home made them independent enough to be by themselves, then my thought personally, if I was doing an assessment and everything was perfect, I would say that individual would not require nor would not need an individual aide in the household to do that task.

Q. Thank you.

Now, let's talk about the change you spoke about with Mr. Kraft to the regulation 18 NYCRR 505.14(a)(3). There was a change in the definition of split-shift services where the language changed from "unscheduled times" to "times that cannot be predicted," is that right?
A. Correct.
Q. You said that's a nonsubstantive change?
A. Yes.
Q. Just so we understand, can you explain to us why the state changed the language of the regulation if no change in substance was intended?
A. I cannot tell you that because at the time the decision was made, when the regs went forward for review, someone else made that change to those regulations at a time I was at my mother-in-law's funeral. So I can't tell you why that decision was made. I was not part of the discussions.
Q. Did you review any documents about the discussions when you returned?
A. No, I did not. No, I did not.
Q. Did you look into the reasons for the change on your own?
A. I did. I did ask at the time the person who was my supervisor, and asked if she could explain to me, when I came back, why the change had been made. And she said it was the decision that the language was not clear, people who were not familiar with 505.14, and did not realize it had been a term of

art for many years, and instead opted to make that change thinking they were making it clearer.
Q. When you say it had been a term of art, what are you referring to?
A. It was in the regs for many, many years and most people who were involved in the personal care program were familiar with that term.
Q. The term is which term?
A. The first term.
Q. Unscheduled times?
A. Yes.
Q. When you say term of art, do you mean that that has a different meaning than its common meaning?
A. No, no, that was not my intent. My intent was just to make the point it had existed for many, many years and people who were familiar with the program were familiar with that phrase. That's all I meant by that.
Q. It's fair to say that predicted has a common meaning also?
A. Pardon me?
Q. The word predicted also has a common meaning, is that true?
A. I think so. Out in the world predicted has a certain definition, connotation that goes with it, yes.
Q. Would you say that the word predicted means the same thing as the word scheduled?
A. That was the intent. When I looked into it, the intent was

just a different word, but it was not the intent to change the meaning in any way, which the administrative directive that was released following the regulations attempted to make very clear.

Q. I understand the intent. My question is, in your view as the witness for the state, does the word scheduled mean the same thing as the word predicted?

A. My understanding is that they would mean the same thing in the context of the regulations.

Q. I see. How about in common usage?

A. Pardon me?

Q. How about in common usage?

A. In common usage? I think for me, yes. For me, yes.

Q. Let me also talk briefly about another change to the regulation. There is a portion of the regulation that said that the local medical directors shall consult with treating physicians, is that right?

A. Yes. Originally, yes.

Q. Subsequently that was clarified that "shall" means "may" there, is that right?

A. Yes.

Q. Do you know what clarified that?

A. What clarified that? I think there was a number of conversations between the state and the local social service districts that it was very difficult to contact every single physician and make actual contact with the physicians. So if the documents without question supported the decision, then it would be up to the local medical director if he felt he needed or she needed to contact the physician of record of the individual.

Q. Am I right that that was clarified in an ADM?

A. I don't believe it was an ADM.

Q. Was it clarified in writing?

A. I really can't remember. I really cannot remember if it was clarified in writing.

Q. Do you remember when it was clarified relative to the shall language being released?

A. I really don't have a memory of it being released. I remember having verbal conversations, but I don't remember a written document. I'm sorry.

Q. In your recollection, it was clarified verbally but not in writing?

A. I remember having extensive conversations with different local social service districts who contacted our office for direction. The regulations were out there, they made the change, but I don't remember if there was any directive, whether a GIS or an LCM or an ADM went out with any direction post that change.

Q. How many local social services districts did you talk to about this issue?

A. I, personally, probably only talked to one. But my staff, who actually take most of the calls from the local social service districts, I know they had talked to some. I don't know specifics or numbers.

Q. Do you know about how many?

A. I would say probably less than six, seven, not many.

Q. How many local social services districts are there in New York State overall?

A. 56 counties. HRA is responsible for the whole City of New York and the counties.

Q. Did the "shall" to "may" change or interpretation, was that ever communicated to the other districts, the other, approximately, 50 districts?

A. I really don't remember if there was a written release. You have to -- of note, New York City has the majority of live-in cases. In the rest of the state there is probably a handful or more. So if New York City understood and any district who had any questions after seeing the change in the regulation called, that would have been addressed verbally at that point in time.

Q. Called the city or called the state?

A. They would have called the state. Districts are responsible for keeping track of the programmatic regulations as they change. If they have questions about them prior to, and often happens the regulations go out and there is a gap in time before a directive goes out, each district knows to call the department. We have a central number for them to call with questions regarding the program or any regulatory questions they may have.

Q. As far as you know, did the state ever make a systematized effort to inform every local social services district that this portion of the regulation that said "shall" actually meant "may"?

MR. KRAFT: Objection. The regulation speaks for itself.

THE COURT: That's true. Sustained.

MR. ROSINUS: May I have a moment?

THE COURT: Yes.

(Pause)

Q. Ms. Willard, a couple of more questions about the predictable versus scheduled change?

A. OK.

Q. You said your supervisor and her staff made the change, is that right?

A. My supervisor and staff above her made the change.

Q. Who was that supervisor?

A. It would have been -- at that point in time, it would have been Mark Kissinger, who was the deputy commissioner.

Q. And there was an ADM issued that said that the change was nonsubstantive, is that right?

A. Yes.
Q. When was that regulation issued -- ADM issued, excuse me?
A. The actual date? I would not know that off the top of my head. I apologize.

MR. ROSINUS: One moment, your Honor.

Thank you, Ms. Willard.

I have no further questions, your Honor.

THE COURT: Who is questioning?

Ms. Dougherty.

CROSS-EXAMINATION

BY MS. DOUGHERTY:

Q. Good morning, Ms. Willard. I am Donna Dougherty for the plaintiffs. I am also going to have questions regarding your affidavit.

You had previously testified this morning that you are the director of the, is it the bureau of continuing care initiatives?
A. No.
Q. You're the director?
A. I was the bureau director at the time for the -- I have been so many places, you will have to excuse me while I refocus. At the time that this occurred, I was the bureau director for state plan services in the office of long-term care.

THE COURT: Ms. Dougherty, just one moment.

Go ahead, Ms. Dougherty.
Q. When you say this occurred, you mean what occurred?
A. I'm sorry. When the regulatory change happened, at that point in time, I was the bureau director for state plan services in the office of long-term care.
Q. You had been in that position for how long?
A. Three, four years.
Q. Your position now is?
A. That's a very good question. Right now I am in the office of health insurance programs in the division of long-term care, and my position has remained the same, but I have now added responsibilities to that position for the transition to manage long-term care.
Q. Thank you.
A. Which previously was the bureau of continuing care initiatives.
Q. So you have been with New York State in these positions regarding the personal care services program for how many years all together?
A. Almost 22 years.
Q. And the other years that you talked about that added up to 32, those were in a local social services in Rensselaer County?
A. Yes, where I was a caseworker and a supervisor.
Q. And so in your position at the state, you have responsibility for both the personal care services program and

consumer directed personal assistance program?
A. Yes.
Q. Can you just tell the Court or explain very briefly what the difference is between the personal care services program that you talk about in your affidavit and the consumer directed?
A. As the affidavit says, the personal care service program is administered by the local social service districts. Personal care services are delivered through licensed home care service agencies under contract to a local social service district. Consumer directed -- and New York was one of the first to have this program -- allows individuals to hire a person to be their aide and to train that individual to whatever skill set they need, personal care, home health aide tasks or nursing tasks, and they basically have the responsibility for hiring, firing, and training those individuals.
Q. Within that program, you can train a worker to do skilled nursing needs?
A. Yes, you can.
Q. That would include things like suctioning a trach?
A. Yes, it would, changing a bandage, anything that a nurse could do which was beyond the scope of a personal care aide or home health aide.
Q. You can receive under this program up to 24 hours continuous care also?

A. Yes, you can.
Q. Just like in the personal care services program?
A. Yes, you can.
Q. The Department of Health is responsible for ensuring that the local social services districts comply with the Medicaid laws for both personal care and the consumer directed?
A. Yes.
Q. You're also responsible for, I think you testified earlier, for ensuring that the local districts comply with the state Medicaid plan?
A. Correct.
Q. And now there are certain, I think you have mentioned already, certain steps that the Department of Health takes to ensure that local social service districts are complying?
A. Yes.
Q. So some of those are, I think you mentioned, that the Department of Health issues administrative directives?
A. Yes.
Q. And in what instances do you issue administrative directives like the one you have attached to your affidavit?
A. An administrative directive is usually released when there is a new regulation and a new policy that the districts need to be aware of.
Q. So in this case, the ADM was issued because there had been a change in the 24-hour continuous care reg?

A. Yes.
Q. In this case, that ADM is in Exhibit K here. I think there was a question earlier of when it was issued subject to the change in the regulation. Does that refresh your recollection?
A. Yes, it did.
Q. So when was this ADM that gave direction to the local social service district issued?
A. April 9, 2012.
Q. And the regulation went into effect when?
A. Technically it was April. We began the regulations, I think it was July. I can't remember. Sorry.
Q. Is there something in your affidavit that would refresh your recollection?
A. Probably.
Q. OK. You have attached to your affidavit an emergency regulation that has an October 2011 effective date. Does that refresh your recollection?
A. It does. That was the change, the date the regulations were put out for the first time.
Q. Were they in effect then in October 2011?
A. Yes.
Q. I think you also said as part of the Department of Health's supervision, you receive questions from the local social service districts regarding changes in the regulation?
A. Yes.

Q. Did you testify that you have a number that the local social services districts can call directly to ask their questions?
A. There is, and it's usually put on any releases by the department. For instance, it's on that -- it's not on the ADM, but it's generally on many releases that the department has. It's a general number. All the social service districts have that number to use.
Q. With regard to this ADM, did you receive -- to the best of your knowledge, did you receive any questions from HRA?
A. I'm sure I did receive some questions from HRA.
Q. Are you guessing or do you remember?
A. I remember telephone calls from HRA.
Q. What were those questions or telephone calls about?
A. I believe one of the first questions related to the local medical director may versus shall contact the physician of record.
Q. Did you clarify the distinction between may versus shall for them?
A. We had a number of conversations, and yes, I think I did. I did my best.
Q. What was your direction to them?
A. My direction to them was, if there is any question, the local medical director should make diligent efforts to contact the physician of record. If they couldn't contact the

physician of record, they should certainly document that, and that I would certainly take their concerns back to the department, and we would discuss clarifying the regulations in a future release.

Q. Thank you. Besides that shall/may, do you remember any other clarifications that the Department of Health made to HRA?

A. I think there were discussions about the term unscheduled, and I believe at that time I made it clear that it was not a change in a concept. It was just a change in a wording.

Q. Any discussions regarding turning and positioning versus transferring?

A. I know I had a discussion about looking at individuals who could not transfer. That meant that they could not -- they did not have upper body strength. And I remember talking about sometimes people who have no upper body strength and can't transfer themselves also cannot position themselves.

Q. So that under the regulations, is it my understanding that that would fit the definition of total need for assistance?

A. I think that my opinion is that positioning is linked to --

MR. ROSINUS: Objection, your Honor. The witness's opinion is not pertinent. It's the state's opinion that is pertinent.

MS. DOUGHERTY: This is the state witness.

THE COURT: I think she is testifying essentially on behalf of the state. The state doesn't talk all by itself.

MR. ROSINUS: I would just ask to make it clear that it's the state's opinion rather than her own.

THE COURT: I don't know what we can do to separate that, so to speak. How does the state talk except through its employees?

Let's put it this way. I think the state is bound by her opinion. Do you disagree, Mr. Kraft?

MR. KRAFT: I think this is as close as we are going to get to finding out what the Department of Health thinks about this.

THE COURT: OK.

Q. Do you need the question?

A. Can you do that one more time?

MS. DOUGHERTY: Can you read that back?

(Record read)

A. Total need for assistance in positioning is something that would occur only if you also needed assistance with transferring. Body mechanics indicate that if you cannot transfer, you have very little upper body strength. If you have very little upper body strength to transfer, therefore you don't have upper body strength to position yourself. So that is why it is not seen as a discrete task in terms of the total help needed.

Q. I think you stated in your affidavit turning and positioning is subsumed within the definition of transferring,

correct?
A. Yes. As a result of body mechanics, yes.
Q. Going back to the Department of Health ensuring the local social service districts' compliance with the regulations, and aside from ADMs, you also issue what are called, I think, government informational systems, also known as GISs?
A. Yes.
Q. Were any GISs issued in regards to the change in the regulation, to the best of your knowledge?
A. I really cannot remember. I apologize.
Q. Were there any other written directives besides the ADM issued, to the best of your knowledge, regarding the change in the regulations?
A. Not to the best of my knowledge.
Q. Aside from the written direction that the Department of Health provides to the local social service districts, and the telephone calls you have spoken about, is there any other way that the Department of Health ensures compliance that the local social service districts are following the regulations?
A. There is -- as you mentioned, there is administrative directives. There are local commissioner memorandums. There's GIS messages. Sometimes if a letter comes in from a social service district, we will respond to that letter in writing. Over time we do questions and answers if we feel there is a topic that frequently comes in to the office seeking clarity.

Sometimes we will release a question and answer document to all the social service districts. So in addition to the verbal, we have many ways of communicating to the districts.
Q. You mentioned letters may come from the local districts. Are you aware that a letter was sent from HRA to the Department of Health requesting the state's help in discontinuing the 24-hour continuous care program?
A. I don't remember seeing one.
MS. DOUGHERTY: I would like to mark an exhibit -- and I am sorry, I don't have stickers, your Honor -- as Plaintiffs' 1.
THE COURT: What is Plaintiffs' 1?
MS. DOUGHERTY: Plaintiffs' 1, your Honor, is a letter from New York City Human Resource Administration, dated June 27, 2011, to Mark L. Kissinger, deputy commissioner of New York State Department of Health long-term care.
Can I approach? And I have one for the Court, your Honor.
Q. I am going to ask you to review and see if this refreshes your recollection, Ms. Willard.
A. Yes.
Q. Does this refresh your recollection that the Department of Health received a letter from HRA describing a plan to discontinue 24-hour continuous care?
A. I remember this now as part of the Medicaid redesign team

project. Yes, I do remember this.
Q. Thank you.
MS. DOUGHERTY: I would like to move Exhibit 1 into evidence.
THE COURT: Received.
(Plaintiffs' Exhibit 1 received in evidence)
Q. Ms. Willard, what was Department of Health's response to this letter received requesting the discontinuance of 24-hour care?
A. This was a small component of another Medicaid redesign team project. I can't speak for the rest of the people that received this letter. It was certainly -- as you said, it was a component of a larger partnership with Health and Hospital Corp. and the attempt was to take some of their high-need cases and review them for efficiencies. That's my memory of this proposal.
Q. Did the Department of Health as a result of this letter discontinue 24-hour services as a part of the regulations?
A. No, they did not.
Q. Did you communicate that with HRA?
A. Well, in no form did we make any changes that would eliminate a level of care.
Q. Thank you.
Now, in addition to letters, is there any other ways the Department of Health reviews compliance from the local

social service districts? We talked about ADMs, GISs, letters.
A. The department staff will sometimes actually make visits to districts and review records. That would be the other primary way.
Q. Do you review statistics regarding reversals in fair hearing decisions?
A. We do within the unit. Let me rephrase that. We did within the unit when we had more staff. We did track fair hearings and reversals, in general terms, across the state, different districts.
Q. What would you look for in reviewing those reversals?
A. We would just look for the number of reversals that occurred, the number of fair hearings where the district's action was supported and the number of fair hearings where the district's actions were not supported. It was very data driven.
Q. If the data showed a high incidence of reversals in a particular local social service district, would that trigger action on the Department of Health?
A. I think that it may trigger some training activities over time, depending on the number of reversals and the issues.
Q. Would you say that a high percentage of reversals is over 90 percent? Would that trigger possibly training?
A. It would certainly be a flag for looking at it, yes, and reviewing it closer.

Q. Do you know if the Department of Health since 2011 has done any training with HRA?
A. No, not to my knowledge.
Q. Since the change in the regulation?
A. Since the change in the regulation, no.
Q. Let's go back even further. Say January 2011.
A. No.
Q. Thank you.
Now, Ms. Willard, is it true that the local social service districts also send reports every week to the Department of Health setting forth each authorization that's been approved by the city?
A. No. What any district does for claiming purposes is enter authorizations into the eMedNY system. I believe in New York they have an adjunct system to eMedNY, and therefore it goes in once a week into eMedNY.
Q. Does your department review those statistics?
A. No.
MS. DOUGHERTY: Can I have one minute, your Honor?
Q. Does anyone at DOH review those statistics?
A. Not to my knowledge. It could be on an annual basis those statistics are gathered, in terms of authorization patterns, but each one is not reviewed. It would be untenable. The numbers would be mind-boggling I think.
Q. I think you said earlier -- I want to be sure I have your

testimony right -- that when you had a larger staff, you would review the statistics, the fair hearing statistics. Do you still do that today?
A. We have not kept as close a watch on those statistics. So I think we are probably significantly behind in tracking those because of a lack of staff.
Q. Would you say that that lack of staff, has that been for over a year?
A. Probably less than a year.
Q. Over six months?
A. Probably about six months, yes.
Q. How large is your staff?
A. Well, right now, for just the personal care program, there are two individuals besides myself who are overseeing it at this point in time. But my staff right now includes other people with other responsibilities.
Q. Besides the personal care services?
A. Besides the personal care services program, yes.
Q. When you say the personal care services program, are those employees also responsible for consumer directed?
A. Yes.
Q. So total for consumer directed and the personal care services program, it's you and two other staff?
A. And half a person. So two and a half. I don't want to lose that half.

Q. I don't either.

Now, I think you said you had 32 years experience at both the local social service district and with the state. You talked a great deal in your affidavit about the assessment process itself. I would just like to talk to you for a moment about that process.

A. OK.

Q. I think you described, with regards to turning and positioning, that's within transferring.

In order to be eligible for 24-hour continuous care, you have stated you need total assistance?

A. Correct.

Q. Toileting, transferring, ambulating or feeding, correct?

A. Yes.

Q. And the regulation, as it stands today, says at times that cannot be predicted?

A. Correct.

Q. But we talked earlier about the consumer directed program, which includes other types of services, such as suctioning. If you had those needs at times that cannot be predicted throughout the day and night, could you receive or be eligible for 24-hour service?

A. I can tell you that if you needed to be suctioned, you should be able to have those services as needed.

Q. As needed?

A. Yes.
Q. So the regulation would not make someone ineligible if they needed that type of care throughout the night?
A. Yes.
Q. For toileting purposes, if you needed a diaper change, you were incontinent and you had to have your diaper changed every two hours and turned a position, the fact that it was every two hours would not make you ineligible for 24-hour care, would it?
A. If you had a need for having your diaper changed because there was a medical diagnosis that insisted that would occur, then that would have to occur. If the doctors certainly and the nurses who did the assessment said that would have to occur, that would be an unusual circumstance to have that need, but yes.
Q. The fact that it was scheduled would not have any effect on the assessment that you may be eligible for 24-hour care?
A. Right.
Q. This regulation regarding 24-hour continuous care, as you have stated in your affidavit, has been around for a very long time, correct?
A. Correct.
Q. I think 1987?
A. I think that's correct.
Q. At that time, I think you have attached to your affidavit the various registers, and you have said in your affidavit that

there were comments back when this regulation was initially being promulgated, is that correct?
A. I think so, yes.
Q. You said some of those comments had to do with whether or not you should include turning and positioning within the regulation, correct?
A. Correct.
Q. And the Department of Health chose not to include it, correct?
A. At that time, they did, yes.
Q. It hasn't changed, the Department of Health's position on including turning and positioning has remained consistent?
A. It has been consistent as long as I have been involved in the program.
MS. DOUGHERTY: Can I take a minute, your Honor?
(Pause)
Q. I would like to go back.
So with regard to the regulation with regard to transferring versus turning and positioning, you have stated that that regulation has remained consistent for all the time you know that you have been at the Department of Health?
A. Those total help needs in those four areas, yes.
Q. Aside from the comments that were received way back in 1987 requesting the change that it be included, turning and positioning be included, since that time, have there been, to

the best of your knowledge, any instructions from the state regarding this issue, regarding that turning and positioning is subsumed within transferring?
A. To my knowledge, the issue has never come up, so no.
Q. Has HRA ever brought it up, to the best of your knowledge, with the Department of Health?
A. I don't remember discussing it.
Q. Even without any discussion, has there been any other written instruction from the Department of Health that explains that turning and positioning is subsumed within transferring?
A. I don't think there was ever a need so I am going to say no. If questions don't come in or there is not a lack of clarity, then no, we don't have to address those issues.
Q. If you were reviewing a fair hearing decision and you saw that a particular local social service district was being reversed on this issue, would that trigger you to take some action to clarify the issue?
A. If we were, which we only look at the data and not the specifics, but if we consistently see any reversals due to a problem, then we would contact the social service district.
Q. Also, in your affidavit talking about continuous care, you talked about the need for toileting and you mention in your affidavit -- withdrawn.
Before I move on, you have an exhibit attached. I would ask you to look at it. It's 11. You have attached it as

part of this discussion.

THE COURT: Did you say 11?

MS. DOUGHERTY: L. I apologize.

THE COURT: The last one.

MS. DOUGHERTY: The last one.

Q. You attached this, I believe, in support of the fact that turning and positioning is part of transferring.

A. Yes.

Q. Can I ask you who receives this document?

A. This document was sent to all local social service districts in 1994 as part of, I believe, an LCM. It's also posted on the department's Web site.

Q. Today?

A. I believe so.

Q. So that even though this is dated 12/1/94, it is in effect today?

A. It has not changed.

Q. When you say it is sent to or was sent, I should say, to all the local social service districts in '94, is there any time that it is subsequently sent?

A. Unless there was a change in this document, it would not be released again.

Q. It would just, as you say, remain on your Web site?

A. Right. And it would remain with the local social service districts for referral and use.

THE COURT: Before you go to a new topic then, let's take a five minute recess, and we will convene at 11:30.

(Recess)

THE COURT: Ms. Dougherty.

MS. DOUGHERTY: Yes, your Honor.

BY MS. DOUGHERTY:

Q. Ms. Willard, I am going to talk a little bit more about that.

So in addition to the continuous care regulation that was modified, you mention in your affidavit there was also an addition to define what is called live-in care, is that correct?

A. Yes.

Q. Live-in care existed for a very long time also, right?

A. Yes, it has.

Q. It just had never formally been in a state regulation defined?

A. Correct.

Q. So the definition, if I can summarize, is that this is for an individual who has needs that are -- it can be toileting, transferring, walking, ambulating, but they need that assistance infrequently?

A. Yes.

Q. Or it can be predicted?

A. Correct.

Q. Now, when the definition or the regulation talks about infrequent, let's take an example of, and I think you discussed this in your affidavit, but let's take the example of toileting. So if an individual needs assistance with toileting during the evening, throughout the day and night, but needs it more than twice, is it my understanding that the Department of Health would say that is actually frequent?

A. The rule of thumb that we have always used is if an aide who is living there could not get an adequate number of hours of uninterrupted sleep, then that individual would not qualify for live-in service.

Q. Otherwise the live-in aide would not be able to function?

A. Correct. During the day when she certainly has to provide support.

Q. And when you say the live-in aide needs uninterrupted sleep, we are talking uninterrupted meaning five hours?

A. At least four or five hours, yes.

Q. Are you aware that there is a Department of Labor regulation that defines that a person on call should get five -- means you should get five hours of uninterrupted sleep?

A. I am. I just became familiar with that.

Q. The Department of Labor regulation?

A. Yes.

Q. And you at the Department of Health, when you're complying with this regulation, would follow the Department of Labor's

direction?
A. Well, the Department of Health wouldn't not follow the Department of Labor's direction.
Q. So when we talk about infrequent, we are talking about the aide getting at least five hours of sleep during the evening?
A. Uninterrupted.
Q. Uninterrupted I should say?
A. Yes.
Q. In addition to the addition of the live-in definition, the Department of Health issued, and I think you attached to your affidavit the state registry that explained the change that the state was going to make to the continuous care regulation, correct?
A. Correct.
Q. As part of that, the Department of Health had to consider the fiscal impact of changing the regulation, correct?
A. The potential fiscal impact.
Q. It was the Department of Health's belief that the change in the regulation would have no significant -- let me rephrase that -- would save potentially the state over $30 million, is that correct?
A. I believe that was the figure, yes.
Q. It's Exhibit I, if you need to look at it and refresh your recollection, but I think it's at page 35 of Exhibit I. 33.1 million?

A. Yes.
Q. Additionally, it was the Department of Health's belief that this change in the regulation would, for most recipients of 24-hour continuous care, they would actually continue to receive the same amount of care, correct?
A. Correct.
Q. So the savings was not coming from a reduction in or should not have come from a reduction in those recipients' cases?
A. No. Again, I want to stress it was potential savings that we looked at. And the potential would be if a local medical director reviewed a case, he may notice that efficiencies were not used and recommend that the assessors go back and use efficiencies in place of an individual. So that's how that figure of potential savings came about.
Q. I want to make sure I understand. Was it the Department of Health's belief that potential savings may come from actually reducing care to recipients, reducing personal care services in the form of aides?
A. I think that the department recognized that the potential would exist for services to be provided by use of efficiencies as opposed to individuals, still being able to make sure that the care that was necessary would be provided. I did not do the fiscal piece for this so I am just telling you my understanding.
Q. Who did the fiscal piece?

A. Off the top of my head, I would have to go back and look and see who did the fiscal piece for this.
Q. Did you provide any direction to the local social service districts, outside of what is in this exhibit, on how the savings should be achieved that you potentially believed may happen?
A. No. Absolutely not.
Q. Now, Ms. Willard, to go for a minute to directions that you do give the local social service districts, I think when looking at potentially reducing recipients' care, you have attached a GIS in a case called *Mayer v. Wing*?
A. Yes.
Q. That's, I think, maybe Exhibit A.
So that when you discussed the local medical directors looking at efficiencies, the LMD would have to comply with this directive and the regulations in *Mayer v. Wing*, is that correct?
A. Yes.
Q. And that would include, when reviewing an assessment and reviewing all the various pieces, that you reduce only if there has been a change in circumstances?
A. Correct.
Q. And you would have to identify those and explain those in the notice that is going to be sent to the recipient?
A. Yes, to be in compliance with *Mayer*.

Q. So the change in the regulations and the fiscal impact does not -- you didn't mean to change anything regarding *Mayer v. Wing*, its regulations and instructions?

A. No. And again, the fiscal piece is something that we have to do with every reg that goes forward.

MS. DOUGHERTY: Let me take one more minute, your Honor.

(Pause)

Q. Ms. Willard, I would like you to go back to the letter that you received that is Exhibit 1, which is the letter from HRA, dated June 27, where HRA suggested reducing, or eliminating I should say 24-hour services.

In here, I know you stated earlier that you don't have statistics on the numbers of personal care recipients, is that correct?

A. What kind of numbers?

Q. You don't receive statistics regarding the numbers of individuals receiving 24-hour split-shift care?

A. Not unless I requested them for some reason. My office does not do that.

MR. KRAFT: To clarify, I asked her whether she would know whether there had been more reductions in care than in the past, and she said that she wouldn't know.

Q. So you wouldn't know. I apologize. I didn't mean to mischaracterize the statement.

If you look at this letter, would this refresh your recollection that the Department of Health may have been notified that there was reductions in split-shift care from 2010 to 2011 by HRA?

A. I see a proposal for the elimination and money savings associated with that.

THE COURT: You want her to just read from the letter?

Are you referring to page 3 where it says, "In addition, during the same period, from January 1, 2010, through May 1, 2011, the number of PCS split-shift recipients have declined from 1356 to 1274"?

MS. DOUGHERTY: That's it. Yes, your Honor.

Q. Would that have triggered any action on the Department of Health to inquire about those reductions?

A. That would be like about a 10 percent reduction. Probably not.

Q. What percentage would trigger an action then by the Department of Health? What would be significant? A 10 percent reduction is not?

A. I would not see a 10 percent reduction as being significant. Maybe a 25 percent reduction would be significant. Because this population changes all the time. People pass away and new people come in. There are new programs that are created such as waivers. So people shift within the construct of long-term care.

Q. So 10 percent would not?
A. 10 percent to me would not be a flag in any way.
Q. But 25 percent or over may?
A. 25 percent may cause me to review it.
Q. Now, Ms. Willard, are you familiar with a case from last year also that involved HRA called *Feldman v. United States*?
A. Yes.
Q. Or *United States v. Feldman*.
You're aware that that case had to do with allegations that the City of New York was not properly assessing people for the personal care services program?
A. Yes.
Q. And there was a settlement in that case, correct, to the best of your knowledge?
A. To the best of my knowledge, only what I read in the newspapers.
Q. As a result of *Feldman*, or subsequent to *Feldman*, were there any trainings done by the Department of Health with HRA?
A. Not to my knowledge, no.
Q. Part of that lawsuit had to do with the city not having the local medical directors do the proper review, correct?
A. Correct.
Q. Was there any direction subsequent to that case that gave directions to the local medical directors on how to assess?
A. No.

Q. But the local medical directors would need to assess taking into account *Mayer v. Wing*?

A. Right. The role of the local medical director has not changed.

MS. DOUGHERTY: I am just going to ask my colleagues.

That's all we have at this time. Thank you so much, Ms. Willard.

THE COURT: Mr. Kraft, any redirect?

MR. KRAFT: No, Judge.

THE COURT: Mr. Rosinus?

MR. ROSINUS: A few quick questions, your Honor.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. ROSINUS:

Q. Hi again, Ms. Willard.

I would just like to clarify something about the part of the regulation that says LMDs shall consult with the recipient's treating physician.

MS. SALZMAN: Objection. I believe this is beyond the scope of cross.

THE COURT: Given that it would very hard to get her back if anyone wanted to recall her, I will allow it.

Do you remember the question?

THE WITNESS: I do.

THE COURT: OK.

Q. This goes back to the cross about shall and may?

A. Yes.

Q. I want to clarify the chronology here. The regulation at first said LMDs shall consult with the treating physician, is that right?

A. That's correct.

Q. Then the state determined that the correct interpretation of that was that "shall" should mean "may," is that right?

A. Correct.

Q. And that was before the regulation was changed?

A. The state, based on input, decided that the "shall" was being interpreted very strictly, and so we went forward and made the change to the regulations for "may," to change it to "may." And the interpretation was given to individual districts that called, that it should be "may," they should make every diligent effort to contact the physician if they felt it was appropriate.

Q. And before the regulation was formally changed, was there any period during which the local social services agencies were supposed to read "shall" to mean "may"?

A. No.

Q. Now, you testified earlier that turning and positioning is different from transferring, is that right?

A. Yes.

Q. You said during cross and in your affidavit that turning

and positioning is subsumed by transferring, is that right?
A. Yes. The body mechanics of transferring are the same body mechanics for positioning, and that's what I meant when I said it was subsumed. The body mechanics of upper body strength that dictates whether you can or cannot transfer also dictate whether you can or cannot position and turn yourself.
Q. To your knowledge, before you wrote or before your affidavit in this case was written, has the state ever explicitly stated what you just said in writing?
A. There has never been a need to. My personal skill set, in terms of assessments and calls that may have come in to me, never led me down the path to think that there was a difference in the body mechanics or in the functional abilities of an individual. So, no, there has been nothing.
Q. How was a local social services district like HRA supposed to know that transferring subsumed turning and positioning?
A. I'm not sure I am making myself clear. It's really a matter of body mechanics. If you look at an individual and they need assistance with transferring, they need upper body strength to do that. So they need assistance with transferring. If, however, you're looking at that same individual who cannot transfer, they also cannot position oneself in bed. So body mechanics links the two functions. I am not sure if I am making myself clear.
THE COURT: It's clear to me. I think that's what

counts.
Q. How about if an individual only needs help with turning and positioning and doesn't need help with transferring?
A. I cannot imagine a diagnosis that would lead me down that road.
Q. So you're saying the person who needs help with turning and positioning will also always need help with transferring?
A. Absolutely. It's a body mechanics issue.
Q. But the activity of turning and positioning itself, which you said was a different activity, is not itself listed in 505.14(a)(3)?
A. Correct. It never needed to be. I think because of the body mechanics, if you needed assistance with transferring, you also need assistance with positioning and turning.
Q. But does it follow that if you need assistance with turning and positioning, you also need assistance with transferring?
A. Probably. It means you have no body strength. If you have no upper body strength in which to roll yourself or pull yourself over, then you don't have enough body strength to push yourself out of a chair.
Q. The only time this would come into play is if someone didn't need help with transferring, right, because the person who needs help with transferring gets split-shift anyway?
A. Yes.
Q. So how about someone who only needs help with turning and

positioning and not transferring?

A. I cannot think of anybody with a diagnosis that only would need assistance with turning and positioning and would not also need assistance with transferring.

Q. I understand the limitations, but indulge me.

A. I am trying.

Q. If someone, for whatever reason, does not need help with transferring, but does need help with turning and positioning, would that person be entitled to split-shift services?

A. If there was someone with a diagnosis that only needed positioning, I guess they wouldn't. I can't think of any time that those two are not inextricably linked.

Q. But you said that person would not?

A. They certainly wouldn't qualify, would they?

Q. They would not qualify for split shifts?

A. They would not qualify as having a total help need with transferring because they don't need help with transferring, they only need help with positioning.

MR. ROSINUS: One moment, please.

THE COURT: What are the four categories again?

THE WITNESS: It's transferring -- toileting, transferring, walking and feeding.

THE COURT: Right.

MR. ROSINUS: Thank you, your Honor.

Thank you, Ms. Willard.

Nothing further.

MR. KRAFT: In response to Mr. Rosinus's question.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. KRAFT:

Q. Can you take a look at Exhibit L attached to your affidavit, the last one?

A. The scope?

Q. Of tasks.

A. Yes.

Q. That was issued I think in 1994?

A. It was updated in 1994, yes.

Q. Mr. Rosinus was asking if the local districts were ever put on notice that positioning is part of transferring. Do you understand that that scope of tasks gave them that sort of notice?

A. You are correct, the scope of function and tasks combines transferring with positioning as well as range of motion since they all relate to the same body mechanics.

MR. KRAFT: Thank you.

THE COURT: Anything further from the plaintiff or Mr. Rosinus, or anybody wants to ask this witness anything?

Mr. Rosinus, you still do?

MR. ROSINUS: Yes, your Honor.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. ROSINUS:

Q. On the exhibit that Mr. Kraft just referred to, Ms. Willard, transferring and positioning are listed separately, is that right?

THE COURT: What page are you looking at?

MR. ROSINUS: It's page 7 of 13.

THE COURT: I would like to get there with you.

MR. ROSINUS: It's number 6, your Honor.

THE COURT: OK. Go ahead.

Q. Transferring and positioning are listed separately, right?

A. They are listed discretely, but under the function of turning, positioning and range of motion. They all deal with the same body mechanics so they are all related. That's why they are grouped there together, yes. But they do individually deal with each one, but yet the reason that they have them A, B, C, D and E is because they are all related. Just like under walking, the one ahead of it on the same page, it is assisting with walking and it's different, but it's the same body mechanics.

Q. Thank you.

MS. DOUGHERTY: One question?

THE COURT: Yes, Ms. Dougherty.

RECROSS-EXAMINATION

BY MS. DOUGHERTY:

Q. Ms. Willard, in your 32 years experience, first at a local social service district and now at the Department of Health, have you ever seen a personal care recipient that needs turning and positioning that does not also need transferring?
A. Absolutely not.
Q. And just to also clarify, if a person needed turning and positioning throughout the night, someone with a bed sore every two hours, that person would in fact be eligible for 24-hour continuous care under the regulation?
A. If that individual had a functional need to be positioned and turned, and by not positioning and turning there could be an adverse impact to their care, then the aide would have to do that task.

MS. DOUGHERTY: Thank you.

THE COURT: All right. You may be able to escape. I think everybody is done with you. Thank you.

(Witness excused)

THE COURT: The reply papers come in this Friday?

MS. DOUGHERTY: Monday I believe, your Honor. I know there was some confusion about this, but originally we were going to do it the 20th, and then because of our schedules, your Honor said, would Monday help us out, and we said yes. So we have it down as the 23rd. We are certainly working on it, your Honor. I am just out of town, your Honor, now from now on.

THE COURT: I guess I have concerns about receiving it in time to read it because I will be traveling on Tuesday. So I have to receive it. I can't receive it on Monday where I am. If my office is FedEx'ing it, they couldn't get it to me until Tuesday, and then I come in Wednesday and the hearing is Thursday, right? The hearing continues on Thursday.

MS. DOUGHERTY: It continues on Thursday. It's just a reply, your Honor.

THE COURT: But there are a lot of issues that were raised in the response briefs. I thought they were pretty serious.

MS. DOUGHERTY: We had the 23rd as the due date.

THE COURT: I somehow got it in my head that it was the 20th.

MS. DOUGHERTY: We will make every effort, your Honor. We are drafting it.

THE COURT: All right. Thank you.

MS. DOUGHERTY: Can I ask one question about that? We were going to write to your Honor. We don't want to respond both to the city and the state separate. We want to do one reply.

THE COURT: Sure.

MS. DOUGHERTY: We need a few extra pages. So as long as it's no more than 20 pages?

THE COURT: On the theory that it would have been 10 each if you responded separately?

MS. DOUGHERTY: Right.

THE COURT: All right.

MR. KRAFT: On a related matter, as you know, this is a very young case and the amended complaint is out there, and we are supposed to answer it by Thursday, which is two days from now, or move to dismiss. I would request a three week extension in our time to do that since we have been busy preparing for this hearing and doing discovery.

THE COURT: Do you know if you plan to answer or move to dismiss?

MR. KRAFT: The state is planning to move to dismiss on some of the grounds we raised in our brief.

THE COURT: I figured you might say that.

MR. ROSINUS: The city plans to answer, but we likewise would ask for three weeks.

THE COURT: So you don't plan a motion at this time?

MR. ROSINUS: No.

THE COURT: What is the plaintiffs' position on this request?

MS. DOUGHERTY: We don't object, your Honor.

THE COURT: Maybe we should just set a briefing schedule on the motion to dismiss now.

Mr. Kraft, when is your answer due?

MR. KRAFT: It's due, I believe, the 19th, 21 days after the date of service.

THE COURT: So three weeks from then would be August 9. That's three weeks.

How long would the plaintiffs like for responding to the motion to dismiss?

MS. SALZMAN: Three weeks, your Honor.

THE COURT: That's August 30.

And reply, Mr. Kraft?

MR. KRAFT: Two weeks, Judge.

THE COURT: All right.

MR. KITZINGER: I just want to point out that I think that is right around the same time as the post-hearing memos are due.

THE COURT: I can't help it. I think they are going to raise similar issues. It's probably best that they be briefed at the same time. That's what Mr. Kraft just said. He was planning to move on some of the very same grounds.

MR. KITZINGER: I didn't want to be surprised in three weeks when that occurs and people are scrambling to get both things done.

THE COURT: OK. In the meantime the city can have until August 9 to answer.

MR. KRAFT: Our reply date was?

THE COURT: September 13. That's a no adjournment schedule.

Thank you. We are all set for today.

MR. KITZINGER: There is an outstanding issue. The state's view is we should be implementing the fair hearing decisions and terminating the split-shift care. Plaintiffs' position is that, no, we can't under the terms of the stipulation.

THE COURT: I think that's right, under the terms of the stipulation. It's only through the PI hearing.

MR. KITZINGER: As long as we have coverage.

THE COURT: Thank you.

(Adjourned)

INDEX OF EXAMINATION

Examination of: Page

MARGARET WILLARD

Direct By Mr. Kraft 3

Cross By Mr. Rosinus 11

Cross By Ms. Dougherty 25

Recross By Mr. Rosinus 52

Redirect By Mr. Kraft 57

Recross By Mr. Rosinus 58

Recross By Ms. Dougherty 58

PLAINTIFF EXHIBITS

Exhibit No. Received

1 35

DEFENDANT EXHIBITS

Exhibit No. Received

A 11